

Fair Political Practices Commission

Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: C. Scott Tocher, Counsel
Luisa Menchaca, General Counsel

Subject: Proposition 34 Retrospective – Proposed Regulatory Refinements

Date: November 24, 2003

I. INTRODUCTION

In October, the Commission directed staff to re-examine Proposition 34 and determine if the Commission should make adjustments to existing regulations or consider additional ones to address important issues. The following is a brief summary of areas staff identified that the Commission may wish to examine in the coming year. In some cases existing regulations may need to be amended and in others an entirely new regulation may be required. The following breakdown groups the projects in terms of potential urgency given the upcoming March primary election. The Commission may wish to further prioritize the projects by focusing only on certain projects and withholding action on others.

Staff Recommendation: In light of the current regulatory load, both present and forecast, the staff recommends the Commission pursue items one through five and number 12. While the other projects have obvious merit, these particular five projects are ones the Commission has specifically asked staff to consider pursuing.

II. PROPOSED PROJECTS

A. HIGH-PRIORITY ITEMS

The following items are considered high-priority items in light of their subject matter and potential impact on the March 2004 primary election. Should the Commission so desire, staff is prepared to bring these items before the Commission in January 2004 for consideration of emergency regulatory action.

- **Item 1: Section 85310:¹ Communications Identifying State Candidates – Issue Advertisements:**

Issue: Does section 85310 operate to effect a \$25,000 limit on contributions received by a candidate's own ballot measure committee for advertisements which feature the candidate?

¹ All references are to the Government Code unless otherwise indicated.

In the first quarter of this year, the Commission adopted a fact sheet discussing the applicability of the recall election statute, section 85315, in the context of the recall election. In July, the Commission adopted regulation 18531.5, which concluded that committees formed primarily to oppose or support the recall election were *not* subject to contribution limits. (Reg. 18531.5, subd. (b)(3).) The Commission followed up this regulation by revising its Recall Fact Sheet the following month. In August, the Commission, on the basis of long-established Commission policy and the case of *Citizens Against Rent Control v. Berkeley*, (1981) 454 U.S. 290, advised that replacement candidates could control ballot measure committees formed primarily to support or oppose the recall election and that such committees were not subject to the contribution limits of the Act. During the recall election this year, Senator Johnson sued the Lieutenant Governor and argued that section 85310 prevents a candidate from receiving contributions in excess of \$25,000 from a ballot measure controlled by the candidate if the communication features that candidate. The Sacramento Superior Court ultimately did not render a judgment on that issue. Staff recommends that should the Commission wish to address the issue it do so in advance of the March primary election to provide sufficient guidance to the regulated community in a timely fashion.

• **Item 2: Section 85316, Regulation 18531.6: Post Election Fundraising:**

Issue: Does the Commission wish to reconsider regulation 18531.6, which allows officeholders with pre-Proposition 34 committees to raise funds into those old committees in excess of Proposition 34 limits?

Section 85316 prohibits candidates from accepting contributions after the date of an election except to the extent the contribution does not exceed net debts outstanding. In regulation 18531.6, the Commission determined that this provision of Proposition 34 does not apply to committees created for an election held prior to the effective date of the proposition. Indirectly, the Commission's regulation was challenged in the *Johnson v. Bustamante* litigation referred to above and the Superior Court disagreed with the Commission.² Instead, the court ruled that a candidate's pre-34 committee was subject to the limitations of section 85316. That ruling, however, is only applicable to the parties. The Commission has been asked for written advice as to the status of that regulation in light of the ruling. Given the proximity to the March election, staff recommends that regulatory action be taken in January to consider whether to amend the regulation on an emergency basis or leave the regulation in place.

² The Commission was not a party to the case and the regulation remains in effect. The deadline for appeal in this case runs during the week of November 24.

B. STANDARD TIME-FRAME PROJECTS:

- **Item 3. Termination of Committees: Regulations 18404-18404.1:**

Issues: Should committees be permitted to reopen after termination? What rules apply to withdrawn candidates? Is the regulation necessary if the Commission changes regulation 18531.6?

Regulations 18404 and 18404.1 require candidates to terminate their committees after a certain period of time after leaving office or after defeat in an election. Generally speaking, these regulations were created, in part, as a hedge by the Commission to contain the impact of the determination that pre-34 committees were not subject to the post-election fundraising limitations of section 85316. If the Commission makes changes to regulation 18531.6, the Commission may also wish to look down the road at whether the committee termination requirements remain essential to the Political Reform Act (“Act”). Should the Commission wish to keep these regulations, the Commission nevertheless may wish to address the increasing number of inquiries addressing the issue of reopening terminated committees to accommodate unforeseen expenditures (some required by law) and receipt of payments. In addition, questions have arisen about the regulation’s impact on candidates who withdraw their candidacy prior to an election. Also, the regulation needs to be amended to clarify that it impacts committees of statewide candidates.

- **Item 4. Recall Elections:**

Issue: Should candidates running in a state election be able to control ballot measure committees without limit?

Regulation 18531.5 provides that a state candidate controlling a recall committee is not subject to contribution limits. This raised many questions during the recent state recall election. One principle issue is whether this rationale applies to candidates who control ballot measure committees generally. The staff would explore this in light of constitutional implications and may recommend amendment of regulation 18531.5 or a new regulation addressing this and related issues.

- **Item 5. Section 85307 - Extensions of Credit: Formerly Proposed Regulation 18530.7; Regulation 18530.8: Personal Loans:**

Issues: Should the Commission reconsider adoption of a regulation addressing extensions of credit? Should the Commission define what “terms available to the public” means?

Section 85307 prohibits candidates from personally loaning himself or herself funds whose balance exceeds \$100,000. With respect to regulation 18530.7, the Commission is asked to determine the length of time that may pass before an extension of credit becomes a contribution. This becomes important for campaigns and businesses that do business with

campaigns. While the Commission determined in September of 2001 not to pursue a regulation on this issue, staff believes the Commission may wish to revisit that determination in light of the continued demand on staff for clarification of the circumstances of the statute's application. For instance, staff recently received an inquiry about whether a campaign worker who had contributed the limit to the candidate could continue paying campaign expenses for which he would be reimbursed under regulation 18526.

The Commission may also want to revisit whether the \$100,000 limit applies to commercial loans to a candidate.

With respect to regulation 18530.8, the Commission may want to review the regulation regarding loans to candidates from commercial lending institutions and what "terms available to the public" means. This issue arose recently in the context of the recall election. The primary issue here is whether a candidate's receipt of a loan on very favorable terms – but not unique to a person of great wealth – meets the standard of terms "available to the public."

- **Item 6. Section 85304 – Legal Defense Funds.**

Issue: Should the Commission define further the meaning of a "defense" fund?

Section 85304 permits candidates to accept contributions in excess of the limits for purposes of paying costs incurred for the "candidate's or officer's legal defense" if he or she is "subject" to one or more criminal or civil or administrative proceedings. The issue has arisen whether a candidate can open a legal defense fund in order to cover costs in a lawsuit filed *by* that candidate against another candidate for campaign-related activities. Staff has advised that the law permits such a use, though this issue is not specifically addressed in the statute or regulation 18530.4.

- **Item 7. Section 85306 – Attribution.**

Issue: What is the effect on the old committee when contributions are transferred to a new committee?

Section 85306 permits candidates to transfer campaign funds from one committee to another. Those transfers, however, must be attributed to specific contributors. As a result, a transfer from committee A of the candidate to committee B of that candidate of, say, \$3,000, must be attributed in committee B as coming from a specific donor from committee A. As a result, that donor is now considered to have contributed \$3,000 to committee B – and thereby reduces accordingly the amount that donor may contribute to committee B without exceeding the applicable contribution limit. The question arises, however, whether the donor can now make *another* contribution to committee A. In other words, since those funds no longer are present in committee A, may the donor make another contribution to that old committee – does the transfer effect a "cleaning" of the record with respect to the contribution history of that donor in the old committee?

- **Item 8. Section 85317 – Carryover:**

Issue: Is a candidate required to be listed on a ballot in an election in order to take advantage of the carryover provision allowing unattributed transfer of campaign funds among a candidate's committees for the same office?

A candidate or officeholder can transfer without attribution campaign funds from a prior election to a committee for a future election for the same office belonging to the same candidate. Without attribution, the candidate may collect new contributions from those same donors up to the contribution limit. Staff has encountered the situation where a member of the state Assembly has opened an '04 committee to run for a Senate seat. The candidate changes his mind and wants to "carry over" the '04 funds to an '08 committee without ever being listed on the ballot. While regulation 18537.1 provides that carryover can occur only after the election has been held, the Commission declined at that regulation's adoption to include language requiring the candidate to run in the election – that issue was reserved pending evidence suggesting such a provision would be necessary. Without such a provision, a candidate could open the committee, not spend any money for that election, and then transfer the funds (without attribution) into the next election for that office and accept new contributions from the same donors.

- **Item 9. Section 85318 – Contributions for Primary and General Elections:**

Issues: Are separate committees required for the primary and general elections?

Section 85318 allows candidates to have separate bank accounts for primary and general elections. Confusion exists about whether a candidate must (or may) form separate committees, and what rules apply about receiving contributions and making expenditures. For example, may the primary account be used to raise money for the general election? What if a candidate receives a check for \$6,400 – may the check be deposited in one account and \$3,200 be transferred to the other account? May the same credit card be used for both accounts?

- **Item 10. Section 85301 – Contribution Limits:**

Issue: Should "personal funds" of a candidate be defined?

Section 85301 establishes contribution limits in state elections from persons. Subdivision (d) of section 85301 exempts from the limits a candidate's contributions of his or her personal funds to his or her own campaign. Staff believes a regulation would be helpful that would clarify what is included in the term "personal funds" – e.g., funds belonging to a sole proprietorship or wholly owned corporation.

- **Item 11. Section 85701 – Disgorgement:**

Section 85701 requires that a candidate or committee that receives laundered contributions must pay those funds to the General Fund. The Enforcement Division proposes that the Commission adopt a regulation implementing this provision.

- **Item 12. Regulation 18428: Affiliated Entities:** Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing of elections. (§ 84211.) Originally, regulation 18428 implemented the Commission's *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a "combination of persons" file one campaign statement. The regulation defined "affiliated entities" as "a person or group of persons whose campaign contributions are directed and controlled by another." Further work concerning the disclosure requirements is needed. Amendments to Form 460 are anticipated. This project is carried over from 2003.

- **Item 13. Regulation 18570: Return of Contributions with Insufficient Donor Information.** Staff proposes an amendment to regulation 18570 to establish a timeline and process for turning money over to the General Fund in cases where a contribution is refunded and the contributor fails to cash the refund check.

- **Item 14. Lobbyist Contributions.** Section 85702 prohibits contributions by a lobbyist to elected state officers or candidates for elected state office, if the lobbyist is registered to lobby the government agency of the elected state officer or the agency to which the candidate seeks election. Initially, this item only concerned when the making of a contribution by a lobbyist was prohibited. However, the adoption of the "making" regulation raised issues concerning whether a regulation is necessary defining when the statute is violated as a result of the *acceptance* of a contribution.